Jerry Ryce Builders, Inc. *and* Illinois District Council No. 1, International Union of Bricklayers and Allied Craftworkers, AFL–CIO. Cases 13–CA–43917 and 13–CA–43918

August 29, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On November 19, 2007, Administrative Law Judge Mark D. Rubin issued the attached decision. The Respondent filed exceptions with supporting argument, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Jerry Ryce Builders, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraph 2(f).

"(f) Within 14 days after service by the Region, post at its Chicago, Illinois office and jobsites copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by other materials. In the event that during the pendency of the proceedings the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, copies of the notice to all employees and former employees of the Respondent at any time since March 9, 2007."

Dated, Washington, D.C. August 29, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Kevin McCormick, Esq., for the General Counsel.
Mark Hansen, Esq., of Chicago, Illinois, for the Respondent.
Robert S. Cervone, Esq., of Chicago, Illinois, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

MARK D. RUBIN, Administrative Law Judge. These cases were tried in Chicago, Illinois, on July 30 and 31, 2007, based on charges filed by Illinois District Council No. 1, International Union of Bricklayers and Allied Craftworkers, AFL–CIO (the Union or the Charging Party) on March 21 and 22, 2007.

The Regional Director's complaint, dated May 10, 2007, alleges that the Respondent violated Section 8(a)(3) of the Act by

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the contentions are without merit.

The Respondent also contends that the judge improperly credited one part, but discredited another part, of discriminatee Dwan Johnson's testimony. We disagree. "[N]othing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony. *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951).

While Chairman Schaumber questions some of the judge's basis for crediting or discrediting certain testimony of the witnesses, he does not find that a clear preponderance of the evidence demonstrates that the judge's credibility resolutions were incorrect.

[3] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) and (3) of the Act by failing to consider for hire union applicants Luciano Padilla, Dwan Johnson, and Humberto Juarez.

[4] We shall modify par. 2(f) in the judge's recommended order to correct an error in the triggering date for the Respondent's provisional notice-mailing obligation under *Excel Container*, 325 NLRB 17 (1997).

refusing to hire, or consider for hire, Luciano Padilla, Dwan Johnson, and Humberto Juarez, and by discharging or constructively discharging Jack (Jacek) Probola and Andrzej (Andy) Kwiecien. The complaint further alleges that the Respondent violated Section 8(a)(1) by interrogating employees and job applicants as to their union sympathies; telling employees that they were not allowed on, or to work on, the jobsite because of their affiliation with the Union; instructing employees to call the Respondent's office or the police if they saw union agents on jobsites; impliedly threatening employees with discharge if they engaged in union activity; promulgating an overly broad rule by instructing employees not to talk to agents of the Union; and instructing employees to stay on jobsites to eat their lunch to avoid contact with agents of the Union.

The Respondent defends by denying it discharged Probola and Kwiecien, and denying that it refused to consider for hire or hire Padilla, Johnson, and Juarez because of their union affiliation. Further, the Respondent asserts that it either engaged in none of the actions alleged as 8(a)(1) violations, or that certain of the actions, as alleged, were taken out of a legal context.

At the trial, the parties were afforded a full opportunity to examine and cross-examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file posttrial briefs. Based on the entire record, including my observation of the demeanor of witnesses, and after considering the briefs filed by the Respondent, the General Counsel, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Illinois corporation, with an office and place of business in Chicago, Illinois, is engaged as a masonry contractor in the business of building and repairing brick, block, and stone materials. During the year 2006, the Respondent purchased and received at its Chicago facility, goods and services valued in excess of $50,000 from firms which in turn purchased those goods directly from outside the State of Illinois. I find, and it is admitted, that the Respondent is, and has been at all times material hereto, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

I find, and it is admitted, that the Union is, and has been at all times material hereto, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

The Respondent has operated as a nonunion masonry contractor in the Chicago area for many years. At some point after the Respondent's inception, it was purchased by its current owner and operator, Boguslaw (Bogdan) Omielan (Omielan), generally referred to as "Bogdan" by the witnesses. His daughter, Izabela, without official corporate title or job description, is a manager who has been employed by the Respondent for about 3 years. She performs many and various job duties including paying bills, meeting with clients, inspecting ongoing jobs to insure compliance with blueprints, and communicating with the Respondent's employees. Barbara Kasper is the Respondent's corporate secretary, meets with potential customers during the bidding process, and performs office work. The unfair labor practices alleged in the complaint occurred in the context of the Union's attempt to organize the Respondent's employees, utilizing a salting strategy.

A. Alleged Probola and Kwiecien Discharges

Jack Probola, an organizer for the Union since August 2006, and a bricklayer for 13 years, approached Omielan about a job on a condominium jobsite near "Western" and "Milwaukee" on February 22, 2007.[1] Probola credibly testified that he wanted to work for the Respondent in an effort to organize the Respondent's employees. Omielan asked Probola about his experience, and Probola told him that he had over 10 years' experience, and that he was not looking for a job for the short term. Omielan told Probola that the Respondent made a profit of about $4 million, that it had about $2 million under contract, that it had 70 Dunkin Donuts to build, and that he was going to need more bricklayers.[2] Probola said that he knew a lot of bricklayers and he would let Omielan know.

Omielan told Probola that he would start work the following week. Omielan asked what Probola was paid on his previous job. Probola said $29. Omielan responded that he could not pay that kind of money, but if Probola was good, Omielan could hire him at $25 per hour.[3] Probola accepted the $25 offer. This conversation occurred in the Polish language, which is Omielan's primary language, and in which Probola is fluent. Probola testified in English, his primary language. Omielan generally testified in Polish through an interpreter, but understood and could speak a very limited amount of English.

Probola called Omielan the following Monday, February 26. Omielan reminded Probola that he needed bricklayers. Probola told Omielan that he would call some friends looking for work. The next day Probola reported to the Western/Milwaukee jobsite and began work for the Respondent. At work on February 27, Omielan told Probola that he was going to need more bricklayers very soon, and if Probola knew some, Omielan could hire them.[4] Probola mentioned "his friend" Andy (Kwiecien). Subsequently, Omielan called Probola and told him to bring

[1] All dates herein reference the year 2007, unless otherwise noted.

[2] Based on other uncontroverted evidence introduced at trial, I find that during the period from February 2, 2007, to shortly before the trial, the Respondent had undertaken some 17 projects in the Chicago area, 3 of which were still underway shortly before the date of the trial.

[3] According to Probola, Omielan testified that Probola asked for $28, but agreed to $25. These different recollections make no substantive difference.

[4] According to Omielan, Probola told Omielan that "he's got a friend . . . that's a bricklayer." Omielan told him, "[A]t this time, I do not need but if he's a friend, then bring him in." Both Omielan and Probola displayed the demeanor of witnesses attempting to testify truthfully. Here, however, the fact that Omielan immediately hired Kwiecien lends support to Probola's version. Further, Probola's testimony as to Omielan's statements as to the success of the Respondent in obtaining work is uncontroverted and also lends support to Probola's version. I, thus, find Probola's testimony that Omielan repeatedly reminded him of the Respondent's need for bricklayers and that it was at Omielan's behest that Probola brought Kwiecien to the jobsite to be credible.

"his buddy" to the jobsite. On Friday, March 2, Omielan again called Probola, and reminded him to bring his buddy to the jobsite.

The following Monday, Probola reported to work at a jobsite in Evanston, accompanied by Kwiecien, an organizer for the Union and a bricklayer for 23 years. Kwiecien began working for the Respondent that day, and either that day or shortly thereafter Kwiecien and Omielan discussed what rate of pay Kwiecien would earn.[5] Kwiecien asked for $27 per hour. Omielan offered $20. The two agreed on $21. There is no credible evidence that at the time they were hired, the Respondent, or Omielan, had knowledge that either Probola or Kwiecien had a relationship with the Union.[6] Kwiecien credibly testified that he wanted to organize the Respondent's employees.

According to Probola, and to the essentially similar testimony of Kwiecien, at about 8 a.m. on March 22, they approached Omielan at the Milwaukee/Western jobsite. They presented Omielan with a letter in both Polish and English that they had previously prepared. The letter stated, verbatim, as follows: "Collectively, both myself Jacek Probola and Andy Kwiecen [sic] request an increased pay rate equal to or exceeding the area standard of between $36.00 and $50.00 per hour. Additionally, on our own time, intend to organize the remainder of your employees to help them also increase their rate of pay. Your prompt response is requested."

Probola further testified, that after receiving the letter, Omielan told Probola and Kwiecien that he "felt something," that they were from the Union, and that they were asking for even more money than union bricklayers earned. Omielan told Probola and Kwiecien that they were not supposed to be there because "you are union."[7] Omielan added that he was not going to give them that kind of money, because "I can't," and that Probola and Kwiecien are "supposed to leave the job." Kwiecien responded, "[I]f you're not going to give us that kind of money we gonna, we want to work, stay and organize the bricklayers." Probola testified that Omielan replied by telling Probola and Kwiecien to "leave the job now."

Kwiecien testified that he handed the letter to Omielan, who tried to hand the letter back. Kwiecien told Omielan to keep the letter. Omielan said that they wanted more money than the union made. Kwiecien responded that it was standard for Chicago. Omielan said that he couldn't give them that kind of money. Kwiecien responded, "Okay, can we come back to work and organize your company on our time?" According to Kwiecien, Omielan did not directly respond to the question, but said that he had a feeling that "you guys" were from the Union. Kwiecien replied, "So what, we just want to organize your company." Kwiecien testified that Omielan responded, "No, you are not supposed to work on this job and you not belong here, just leave." Kwiecien testified that the entire conversation occurred in Polish.

Omielan testified that Probola and Kwiecien handed him the letter, and asked his opinion. Omielan noticed the $50 figure and told them that he had agreed to pay Probola $25 and Kwiecien $21, and that was how much he could pay them. Probola and Kwiecien responded that "for that kind of money they were not going to work." Omielan said, "Well, then you will not work."

Gregor Podjasek, a longer-term employee of the Respondent, and called as a witness by the Respondent, testified to overhearing the conversation.[8] Podjasek has been employed by the Respondent for about 4 years, first as a bricklayer, and then as a forklift operator. Podjasek, on direct examination, after initially denying he knew Kwiecien, testified that he knew Kwiecien because they both attended a company "safety" meeting. Podjasek testified that at about 8 a.m. as he was at the jobsite preparing for work, he saw Probola and Kwiecien hand a piece of paper to Omielan, and Kwiecien tell Omielan that

[5] Kwiecien did not testify as to whether he and Omielan had a conversation before Kwiecien began working for the Respondent. Omielan testified that they spoke, but that he remembered nothing of the conversation.

[6] Omielan testified that prior to the occasion he hired Kwiecien, he had noticed him on a different construction site, sometime in the first 6 months of 2006. Omielan testified, "I have a construction site on Foster and there was a picket line from the Union, he was coming and going and was passing around. He wasn't standing there in the picket line. He was just, he arrived, he walked around and he left." Counsel for the Respondent then asked Omielan, "Based on what you had seen of Andy at the time before he came to the jobsite, did you have any thoughts as to what his involvement with the Union was?" Omielan answered, "It was kind of far but I have seen him that he had a conversation with the people that were on the picket line and what function he was having and the Union, I have no idea." But then in answer to further questions from the Respondent's counsel, Omielan testified, in essence, that at the time he hired Kwiecien, Omielan believed Kwiecien was "involved with the Union," because "I did see him when he was talking to the people at the picket line. . . ."

I find that this testimony of Omielan is not credible or reliable in establishing prior knowledge of Kwiecien's union affiliation. When the Respondent's counsel asked Omielan the question the first time, Omielan responded by mentioning that Kwiecien was "kind of far" away, and that he had "no idea" what Kwiecien's involvement with the Union was. Omielan said nothing in his initial answer about seeing Kwiecien speaking to anybody. It was only subsequently, after the Respondent's counsel asked Omielan if he had any thoughts as to Kwiecien's involvement with the Union based on what he had seen, that Omielan testified that at the time he hired Kwiecien, he believed he was involved with the Union because he saw Kwiecien talking to people on the picket line. Further, the Respondent's position statement to the Region, submitted during the course of the investigation, in arguing that the Respondent had knowledge that Kwiecien and Probola were affiliated with the Union, asserts that such knowledge occurred after the two were hired. In view of Omielan's admission that he was far away, his testimony the first time that did not include mention of seeing Kwiecien talking with anybody, and the Respondent's position statement, I find that Omielan's testimony that at the time he hired Kwiecien and Probola he believed they were affiliated with the Union, not to be credible.

[7] As to Probola's testimony, the transcript literally reads as follows: "And he says you're not supposed to be here. Andy ask him a question why. He says because you are union that's not a job. You're supposed to be here." The transcript appears in error here. Probola testified to the effect that Omielan told him and Kwiecien that they were not supposed to be on the job because they were union. In other words, Probola testified that Omielan told Kwiecien that because he was union, he was not supposed to be on that job.

[8] Podjasek testified in Polish, through an interpreter.

they wanted to speak to him. According to Podjasek, after Omielan took the paper, he asked, "[Y]ou want higher wages than the Union?" Omielan, Podjasek testified, then told Probola and Kwiecien that they "can go back to work because I cannot accept this paper." Finally, Podjasek testified that Kwiecien said, "We'll soon meet," and Probola and Kwiecien walked to their cars.

When Podjasek, on direct examination, was asked whether he could recall anything more about the conversation, he testified, "Well, no, it's just what I stated before that after they showed the piece of paper, Bogdan (Omielan) protested then and he said you know that I am not a union company and I cannot pay you so much and I cannot accept that. So they turned around and walked away." Subsequently, on cross-examination by the Union's counsel, Podjasek admitted that Omielan told Probola and Kwiecien that he knew they were from the Union.

I credit the testimony of Kwiecien, and the essentially similar testimony of Probola, as to the conversation. Kwiecien and Probola displayed impressive testimonial demeanor and appeared to be earnestly attempting to truthfully answer the questions of all counsel, including on cross-examination. Podjasek was less impressive. After testifying on direct examination that he was present to hear the conversation because he was "preparing for work," Podjasek testified on cross-examination by the Union's counsel that, in fact, he was doing "nothing" at the time of the conversation, just "standing there" propped "against the cilice." On cross-examination by the Union's counsel, Podjasek testified that at the time of the conversation he was not a forklift operator, but later on cross-examination when asked who was operating the forklift that day, Podjasek testified, "It was I." On direct examination, Podjasek testified that he could remember nothing else about the conversation, but on the cross-examination of the Union's counsel, Podjasek suddenly remembered that Omielan had said that he knew Probola and Kwiecien were from the Union.[9] I also recognize that Podjasek is economically dependent on the Respondent as a long-term, full-time employee.

Omielan was responsive to questions of all counsel and otherwise displayed appropriate witness demeanor but, in the context of the Union's attempt to organize the Respondent, his testimony is not logical. For Omielan to be credited, I would have to accept that the two paid union organizers, Kwiecien and Probola, were willing to quit their jobs in a dispute over a wage increase, when their entire purpose in securing employment with the Respondent was to organize the Respondent's employees. Indeed, the Board has recognized that "a salt seeks employment for the purpose of furthering a union's objectives . . . ." *Oil Capitol Sheet Metal,* 349 NLRB 1348, 1355 (2007).

On balance, in weighing my conclusions as to Podjasek's credibility, the demeanor of all the witnesses, and the context in which the conversation occurred, I credit the testimony of Kwiecien[10] and the essentially similar testimony of Probola as to their conversation with Omielan. Accordingly, I find that in response to Kwiecien telling Omielan that he and Probola wanted to continue to work for the Respondent and organize the Respondent's employees on their own time, Omielan told them that they did not belong there, and to leave. I also find that after Kwiecien handed Omielan the letter, Omielan said that he had a feeling they were from the Union.

B. Alleged Refusal to Consider, and Failure to, Hire

Pursuant to the Union's organizing campaign, Union organizer Luciano Padilla, accompanied by union bricklayers Dwan Johnson and Humberto Juarez traveled to the Respondent's jobsite on March 9, about 3 days after Probola told Padilla that the Respondent was looking for more bricklayers.[11] Organizer Padilla completed the apprenticeship program of Local 24, International Union of Bricklayers and Allied Craftworkers, AFL–CIO (Local 21), and is a journeyman bricklayer with 7 years of experience. Johnson is enrolled in Local 24's apprenticeship program, and has completed the 3 months of required classroom training and 2000 of the required 4500 hours of actual on-the-job training. Juarez, a journeyman bricklayer, has completed a union apprenticeship program which required 4500 hours of apprenticeship training, and has been a bricklayer since 1998.

When Padilla, Johnson, and Juarez went to the Respondent's jobsite, all wore attire with the Union's or a union's logo or

[9] Also troubling in respect to Podjasek's credibility, counsel for the General Counsel, on cross-examination, asked Podjasek a straightforward question, as to whether, prior to testifying, he had spoken with anybody concerning his testimony. Podjasek instead of directly answering the question, responded; "For what, I don't understand the question." When the same question was asked a second time, Podjasek denied he had spoken to anybody about his testimony, prior to testifying. Podjasek then went on to specifically deny that he had on any prior occasion spoken about his testimony to the Respondent's attorney, to Omielan, or to anybody else. To accept this testimony, I would have to believe that the Respondent's counsel had no idea what Podjasek would testify to, whether Podjasek was actually a witness to the conversation, whether Podjasek was able to hear the conversation, and whether Podjasek's testimony would help or hurt his client. The Respondent's counsel appeared otherwise well prepared to present and argue his case, and competent. In my experience, with no idea as to whether a prospective witness would help or hurt his case or was even a witness qualified to testify as to an occurrence, it is highly unlikely that a competent attorney would put such a witness on the stand. This lends further doubt to Podjasek's veracity and to Omielan's version of the conversation.

[10] The Respondent introduced an Illinois wage claim application completed by Kwiecien on March 23 seeking redress for the Respondent's failure to pay earned wages to Kwiecien. In the application, Kwiecien wrote the following, apparently as a reason for discharge: "For asking for my money." The Respondent argues that this statement contradicts the General Counsel's 8(a)(3) theory of discharge. There is, however, no other evidence which would support the idea that Kwiecien was fired for seeking payment of his earned wages or that the subject even came up in the discharge conversation. Indeed, as found, the evidence demonstrates that Kwiecien (and Probola) were discharged because of their relationship to the Union. Even if Kwiecien believed when he filled out the application that he was fired for seeking his earned wages, this would not change the result herein. My findings herein are based on the evidence presented, not what Kwiecien may have believed when he filled out the application on March 23.

[11] Probola's superior, Union Lead Organizer Steve Nelms, had discussed with Padilla that the Respondent was considered a target for organizing.

name prominently displayed. After locating Omielan working on a scaffold, Padilla, accompanied by Johnson and Juarez, conversed with Omielan. Padilla told Omielan that they were bricklayers looking for work. Omielan replied that he wasn't looking for bricklayers. Padilla asked about the Respondent's job on Western and Milwaukee. Omielan said that he had only one group working. Padilla asked if he was sure that the Respondent didn't need bricklayers.[12] Omielan responded, "Yes," and asked, "why doesn't the Union get you a job." Padilla responded that he wanted to work there because the jobsite was close to his house.

Padilla asked if he could fill out an application or leave his name. Omielan answered, "No." Padilla asked Omielan for his card. Omielan refused. Juarez and Johnson asked again if he was sure he wasn't looking for any "guys." Omielan said he wasn't looking for "any guys." Padilla asked Omielan who he was, and Omielan answered that he was the Respondent's superintendent. Padilla asked again for Omielan's business card, and Omielan again refused. Padilla, Johnson, and Juarez continued to ask Omielan questions, but he stopped responding. After the conversation, Padilla, Johnson, and Juarez waited for a while at the jobsite, but Omielan avoided them. Eventually, Padilla, Johnson, and Juarez left the jobsite.[13]

On January 3, 2007, about 2 months before Padilla, Johnson, and Juarez traveled to the jobsite, the Respondent placed a "help wanted" classified advertisement in the "Polish Daily News" of Chicago. The advertisement, in Polish, stated that the Respondent was seeking bricklayers and helpers to bricklayers. In addition to the hiring of Jaroslaw and Marcin Sral, discussed below, the Respondent hired two additional bricklayers in June.

C. Respondent Hires Jaroslaw Sral and Marcin Sral[14]

Jaroslaw Sral is a journeyman bricklayer with more than 5 years of experience, and a member of Local 74, International Union of Bricklayers and Allied Craftworkers, AFL–CIO. Sral was referred by a member of a Bricklayers Union Local to the Respondent to seek work.[15] On March 16, Sral traveled to the Respondent's jobsite on Belmont and Cicero. Sral asked for the "owner," and then spoke to Omielan, who took Sral to a nearby bank parking lot for the conversation. They conversed in Polish. Sral asked about work. Omielan asked Sral if he ever belonged to a union. When Sral responded in the negative, Omielan said that it was good that he did not belong, and that in 6 months Omielan would give Sral all of the benefits he would get with a union, including vacation. Omielan added that he had enough work for 3 years, that he had about 30 Dunkin Donuts and 3 condominiums. Sral asked if Omielan could hire his brother, who was looking for a job. Omielan said he would think about it, and give Sral a call. Later that day, Omielan called Sral, and told him to bring his brother, Marcin Sral, to the Evanston jobsite the following day. Marcin Sral had less than a year's experience as a bricklayer, and had completed 1 year of a 3-year union apprenticeship program.

On March 17,[16] both Sral brothers reported to the Evanston jobsite in the morning. At the jobsite, Omielan asked if they were with a union. They responded that they didn't "work for a union." Omielan asked if they knew any other bricklayers and told them to go to work. Jaroslaw worked as a bricklayer, and Marcin worked as a laborer the first week, and subsequently

[12] Padilla's actual testimony was, "I said if he was sure, and he said yes." However, in the overall context of Padilla's testimony, I find that Padilla's question went to Omielan's responses that the Respondent didn't need bricklayers.

[13] My finding of facts as to the conversation is based on the credited testimony of Padilla, and the essentially similar testimony, in most substantive respects, of Johnson and Juarez. In addition, Johnson testified that Omielan asked whether they "worked for the Union." Neither Padilla nor Juarez testified to Omielan asking this question. In view of the testimony of Juarez and Padilla, and because all three were wearing union logo attire, thereby making such a seemingly redundant question unlikely, I find that Omielan did not ask whether the three "worked for" or were affiliated with the Union.

Omielan testified in English, as to the conversation, which took place in English, as follows: "That guy, three guys, is speaking about what—the company, Jerry Ryce. Me, I'm Jerry Ryce. Okay, and another union, I'm not union. Next I'm—the job, who are you, your bricklayer, your neighbor? I'm bricklayer. I'll write down the phone—the bricklayer. Okay, and another speaking about—are you working the western—yes, I'm working the western—. And what crews is working the—western? Same crews, same guy. Okay, what's your name? Boguslaw. Okay, thank you very much. That was it."

But the Respondent's position statement to the Region during the investigation, introduced by the General Counsel, stated as follows: "We understand that Luciano Padilla, Dwan Johnson or Humberto Juarez claim to have applied for work with Jerry Ryce Builders on March 9, 2007, and that they spoke with Jerry Ryce's Superintendent Bogdan on that matter. However, Mr. Bogdan Omielan has no recollection of speaking to anyone on or around that date about employment with the Company. Similarly, Mr. Omielan cannot recall either refusing to accept contact information from anyone seeking work, or discussing union affiliation with anyone seeking work at the time alleged."

Padilla, Johnson, and Juarez all displayed the testimonial demeanor of witnesses attempting to truthfully answer questions of all counsel. While their testimony was not identical, it was consistent on the substantive issues. Further, Probola credibly testified that he was working nearby during the conversation, that he was able to hear some of it, and that he heard Omielan comment to Padilla, Johnson, and Juarez to the effect that the Union had no jobs, and that he was not going to hire any bricklayers. On the other hand, the Respondent's position statement is clearly inconsistent with Omielan's testimony and its level of detail, and demonstrates that at least as of the date of the statement, April 4, 2007, Omielan either had no recollection of the conversation or asserted that he did not. On balance, I credited the testimony of Padilla, and the essentially similar testimony of Johnson and Juarez.

The parties elicited testimony from the various witnesses as to how far off the ground Omielan's scaffold was at the time of the conversation. Even if the scaffolding was 10 to 15 feet off the ground, as testified to by Omielan, there is insufficient evidence that this would preclude either the conversation, or the ability of the various witnesses to hear what was said.

[14] Omielan testified that sometime after Padilla, Johnson, and Juarez visited the jobsite, he hired a bricklayer and also hired the bricklayer's brother as a laborer. Omielan testified that the bricklayer's name was "Yarek Struch." Clearly, in the context of the entire record including the testimony of the Sral brothers, Omielan was referring to the Sral brothers. None of the briefs addresses Omielan's testimony as to "Yarek Struch."

[15] Sral testified that he was referred by Robert Fital from "Local 21, BAM."

[16] I note that March 17, 2007, was a Saturday. All witnesses agreed that the Sral brothers were hired on a Saturday.

laying brick. On direct examination, the Respondent's counsel asked Omielan, "Why were you able to employ the bricklayer and the laborer about a week after you had told the three applicants that there was no work?" Omielan answered as follows: "Because I needed one bricklayer and not the three of—, not three bricklayers."

At about 7:30 a.m., Omielan asked Jaroslaw Sral a second time if he had a friend, or knew anyone looking for a job, because he needed bricklayers. Sral responded that if he knew of anyone, he would let Omielan know. Later that morning, at about 9:10 a.m., Omielan approached Jaroslaw Sral at the jobsite, and again asked if he belonged to the Union. Sral answered that he did not belong. Omielan responded that was very good "because the Union is shit." Later that week, Omielan had two additional conversations with the Sral brothers at the jobsite. During both conversations Omielan asked the brothers whether they "worked" for the Union, and whether they knew any other bricklayers because he needed workers. During the second conversation, Omielan said that he was going to hold a meeting the following day.

On March 23, the Respondent held a meeting for its employees at its office, before work. The Sral brothers, other workers, Bogdan Omielan, Izabela Omielan, and Barbara Kasper attended the meeting. Bogdan Omielan, Izabela Omielan, and Kasper spoke about safety issues at the meeting, with Bogdan Omielan telling the Respondent's employees that the "Union is sending OSHA so please be careful and use the safety precautions on the jobsite." During the course of the meeting, Bogdan Omielan told the Respondent's employees that Probola and Kwiecien belonged to the Union and he had fired them,[17] and that the employees "got to watch out for union guys," and if they "see them [Probola and Kwiecien] on the job, call police because they're union and they're not supposed to be there." Bogdan Omielan also instructed the Respondent's employees, "that we would take lunch on the jobsite, just to stay on the job, don't go out to our cars because union guys might come up and talk to us."[18]

About March 28, while Jaroslaw Sral was working on the Evanston jobsite on the second floor, Bogdan Omielan again conversed with Sral about the Union. Omielan again asked Sral if he belonged to a union. Sral responded that he did not. Omielan told Sral that Izabela Omielan was bringing an IRS W-4 form to the jobsite, and that if Sral ever belonged to the Union, he would have problems with the Union and with IRS.[19]

---

[17] Jaroslaw Sral credibly testified as follows as to what Omielan said: "He says Jacek [Probola] and Andrzej [Kwiecien] belong to the Union and he let them go."

[18] Credited testimony of the Sral brothers. Their testimony is essentially similar. They both demonstrated the demeanor of witnesses striving to truthfully answer the questions of all counsel. They both demonstrated good memory, and their testimony was consistent on cross-examination. This is not to say that their testimony was identical or that there weren't minor inconsistencies. For example, as to what Bogdan Omielan said at the meeting as to eating lunch on the jobsite, Jaroslaw Sral testified that Omielan told them to eat on the jobsite "because there might be Jacek, Robert and Andrzej and they will try to make us belong to the union. To avoid any conversations with them." Marcin Sral testified that Omielan "said we would take lunch on the jobsite, just to stay on the job, don't go out to our cars because union guys might come up and talk to us."

Contrariwise, despite extensive testimony at trial, Bogdan Omielan did not deny the comments attributed to him by the Sral brothers. Further, even though both Izabela Omielan and Barbara Kasper were called as witnesses by the Respondent, and testified as to the meeting, neither specifically denied the comments attributed to Bogdan Omielan by the Sral brothers. Izabela Omielan testified that her father, Bogdan, was present at the meeting, that the meeting was a "safety meeting," that she passed out a safety brochure as to power lines, that she instructed the employees to read the brochure and to sign a paper confirming that they read the brochure, that she reiterated to the employees that they should stay 10 feet away from power lines, and that Barbara Kasper also spoke to the employees. She testified that before the meeting started some of the employees were standing around in groups, and she overheard "a couple questions the guys were asking like what's going on with our company. I don't know, I didn't really hear anything specific." After testifying that she didn't "hear anything specific," Omielan later added that she assumed they were talking about union activities because she heard the word "union" spoken, but also testified that she could not identify which employee made the comment.

Izabela Omielan further testified that Barbara Kasper told the employees that if they see trespassers on a jobsite they should not let them in because it was a safety issue, and that if they were interested in a union, they can go to union meetings after work and not to discuss these things during work. Izabela Omielan also testified that at some point during the meeting, one of the employees said that he would go and "beat them up," apparently referring to union members or representatives, "and there will be no problems." According to Izabela Omielan, "And that's when my father broke down. He's like, no, no, no. Leave them alone, you know. Let it be, you know."

Kasper testified that after Izabela talked about safety, Kasper talked about the Respondent's rules, that employees' free time is their free time, but when they are working they shouldn't be talking to anybody, that during the lunch and after lunch they are free to do whatever they want, and that the Respondent "didn't want them to get to any activities other than work in our work sites or on our property." Kasper also testified that one of the employees asked, "What can I do if I don't want to talk to union representatives." According to Kasper, Bogdan Omielan answered, "Just eat lunch inside."

In my observations, both Izabela Omielan and Kasper displayed the demeanor and other characteristics of truthful witnesses. They displayed good recall, and were reasonably consistent with their answers both on direct and cross-examination. As noted earlier, and significantly, neither specifically denied the statements attributed to Bogdan Omielan by the Sral brothers. On balance, I credit the testimony of the Sral brothers as to statements made by Bogdan Omielan at the meeting.

[19] Credited testimony of Jaroslaw and Marcin Sral. Their testimony was substantively similar, not identical, as to what Omielan said to Jaroslaw on March 28. They both testified that they were both present for the conversation. Omielan testified, but did not deny the Sral's testimony as to the conversation.

I also credited the testimony of the Sral brothers as to conversations one or both had with Omielan on March 16 and 17, and a few days later. To the extent Omielan testified to the contrary, he is not credited. Again, both Sral brothers testified forthrightly and consistently on direct and cross-examination, and demonstrated excellent recall of the events. Omielan was confused as to the Sral brothers' names, couldn't initially remember when the first conversation occurred until suggested by counsel, and could not remember anything about that conversation other than "he is looking for a job and do I need a bricklayer?" Finally, Omielan answered "no" to the following question posed by the Respondent's counsel: "Were there ever any discussions between you and the two brothers who you hired about the union during the period

ANALYSIS AND CONCLUSIONS

A. Interrogation

The complaint alleges that, in violation of Section 8(a)(1), Bogdan Omielan interrogated a job applicant about March 16, and interrogated employees about March 17 and 29. I found that on March 16, when Jaroslaw Sral first approached Omielan about a job, Omielan asked whether Sral ever belonged to a union, and that when Sral answered in the negative, Omielan told him that was "good." I also found that on March 17, their first day at work, Omielan asked both Sral brothers if they "were with the Union," and later that same day again asked Jaroslaw Sral if he belonged to the Union and, when Sral again responded in the negative, told Sral that was good because the "Union is shit." Finally, I found that on March 28, Omielan again asked Jaroslaw Sral if he belonged to a union.

The General Counsel maintains that Omielan engaged in coercive interrogation on each of these occasions. The Respondent, in its counsel's brief, argues that the testimony of the Sral brothers lacks credibility. The Respondent's brief also cites *Emery Worldwide*, 309 NLRB 185 (1992), for the proposition that interrogation of employees is not unlawful per se, and argues that the purported interrogations were not coercive because the Sral brothers "never spoke with other employees about these statements, and their employment ended when they simply decided to quit and join the Union's picket."

In deciding whether Omielan's questioning of Jaroslaw and Marcin Sral violated the Act, I apply the Board's standard set forth in *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) ("whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed in the Act"). In *Sproule Construction Co*., 350 NLRB No. 65 fn. 2 (2007), the Board found questioning to be coercive when it occurred in the following circumstances: the applicants were seeking employment; the applicants sought to conceal their union affiliation; the respondent offered no legitimate explanation for the questioning; and, the questioning occurred amidst other serious unfair labor practices.

Here, during the initial questioning, Jaroslaw Sral was applying for work. In both the initial and subsequent questioning, the Sral brothers were attempting to conceal their salt status with the Union, the Respondent offered no explanation for the questioning, and the questioning occurred in the context of other serious unfair labor practices found herein. In addition, the interrogator, Omielan, is the owner of the Respondent, the questioning was repeated, and during the course of one of the interrogations and after the Srals denied a relationship with the Union, Omielan expressed his opinion of the Union using an obscenity. Under all these circumstances, the questioning of the Sral brothers on March 16, 17, and 28,[20] was coercive, and I find that the Respondent violated Section 8(a)(1) by engaging in coercive interrogation as alleged in the complaint.

B. Allegations Involving the March 23 Meeting

The complaint alleges that at a meeting the Respondent held for employees on March 23, Bogdan Omielan illegally interfered with Section 7 rights by instructing employees to call the office and police if they saw union agents on jobsites, impliedly threatened discharge if employees engaged in union activity, and promulgated an overly broad rule prohibiting employees from talking to union agents. I found that at the meeting Omielan told the assembled employees that Probola and Kwiecien belonged to the Union and he had fired them, that the employees had to watch out for "union guys," that if they see Probola and Kwiecien on a jobsite they should call the police because they're not supposed to be there, and that the employees should take lunch on the jobsite and shouldn't go out to their cars because "union guys" might come up and talk to them.

The General Counsel, in its brief, maintains that telling the assembled employees that Probola and Kwiecien belonged to the Union and he fired them implies a threat to fire any employee so involved, that instructing employees to call the police if Kwiecien and Probola appear on a jobsite interfered with Section 7 rights, and that instructing employees to eat lunch on the jobsite to avoid contact with the Union violated Section 7, as employees have a Section 7 right to speak to union representative on jobsites and during lunch periods. The Respondent, in its brief, argues that the Sral brothers are not credible witnesses so that there is no credible evidence that Omielan made the allegedly violative statements at the March 23 meeting. The Respondent impliedly argues in its brief that Omielan's general denial that there were ever any discussions with the Sral brothers about the Union after they were hired, served as a denial that he made the allegedly coercive statements to the assembled employees during the March 23 meeting.[21] Finally, the Respondent maintains that the statements made by Izabela Omielan and Barbara Kasper at the March 23 meeting legitimately dealt with employee concerns in a noncoercive fashion and did not violate the Act.

In analyzing actions alleged as 8(a)(1) violations, the Board's well-settled test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. Interference, restraint, and coercion does not turn on the employer's motive or on whether the coercion succeeded or failed. *American Freightways Co.*, 124 NLRB 146, 147 (1959). Implied threats of discharge because of union activity coerce employees in the exercise of Section 7 rights. *Kona 60 Minute Photo*, 277 NLRB 867 (1985). Omielan's statement at the March 23 meeting connected the union membership of Kwiecien and Probola to their discharge. Such statements, which connect union activity with discharge, imply a threat of discharge to other employees who engage in such conduct. *Kona*, supra at 868. Accordingly, I conclude that the statement by Omielan violated Section 8(a)(1) as alleged in the complaint.

---

they were employed for Jerry Ryce?" But this question specifically limited the time period to when the brothers were actually employed by the Respondent which, therefore, didn't include the initial conversation which occurred prior to employment, on March 16.

[20] The complaint alleged that the final interrogation occurred on March 29. Based on the testimony of the Sral brothers, I find that it occurred on March 28.

[21] I reject this contention. The question was limited to conversations with the Sral brothers.

It is well settled that Section 7 rights include the right to speak to union representatives and to participate in union activity during nonworking time. *Earthgrains Co.,* 351 NLRB No. 45 (2007). Telling employees to eat their lunches on the jobsite and avoid going to their cars so as to avoid speaking to union representatives clearly interferes with Section 7 rights, as does instructing employees to call the police if they see Probola or Kwiecien, whom he had identified as union affiliated, on the jobsites. Accordingly, I conclude that Omielan's statements to employees at the March 23 meeting to that effect, violate Section 8(a)(1) as alleged in the complaint.[22]

Finally, I reject the Respondent's argument, proffered in its brief, to the effect that because, assertedly, neither Izabela Omielan nor Barbara Kasper made statements at the March 23 meeting that interfered or coerced employees in the exercise of Section 7 rights or that they described Section 7 rights in an arguably permissible fashion; therefore, the Respondent did not violate the Act. Even assuming Izabela Omielan and Barbara Kasper properly explained to the assembled employees their rights to speak to union representatives, all of the employees present knew that Bogdan Omielan, not Izabela Omielan or Barbara Kasper, was the owner of the Respondent and the ultimate boss. It is axiomatic that such words from the Respondent's highest-ranking manager have a greater impact on employees than do the more conciliatory words of the Respondent's secretary or the owner's daughter. I also note that the complaint does not allege that the words or actions of either Kasper or Izabela Omielan on March 23 or any other time constituted violations of the Act.

C. Refusal to Hire and Consider for Hire

The complaint alleges that on March 9, 2007, the Respondent refused to hire and consider for hire job applicants Luciano Padilla, Dwan Johnson, and Humberto Juarez. I found that the Respondent placed a newspaper advertisement for bricklayers and helpers on January, 3, that in March Omielan repeatedly told the Sral brothers and Probola that he needed more bricklayers, that union organizer Luciano Padilla and union members Dwan Johnson and Humberto Juarez spoke to Omielan about obtaining jobs on March 9 without success, that the Respondent hired Jaroslaw and Marcin Sral about March 17, and that the Respondent hired two additional bricklayers in June. I further found that Padilla, Johnson, and Juarez displayed their union status to Omielan by wearing various clothing with union logos, while the Sral brothers concealed their union membership from Omielan. Finally, Omielan testified that the reason he was able to employ the Sral brothers about 1 week after he told Padilla, Johnson, and Juarez that there was no work was "because I needed one bricklayer and not the three . . . ."

The Respondent's counsel, in his brief, maintains that the General Counsel has failed to establish that the Respondent had job openings,[23] or that animus was a motivating factor. The Respondent further contends that one of the three union job applicants, Johnson, had inferior job qualifications to the subsequently-hired Jaroslaw Sral and, hence, Johnson's "experience would not have qualified him for the position taken by Jaroslaw. . . ." The General Counsel contends to the contrary.

The Board, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1992), analyzes refusal-to-hire cases pursuant to a set of guidelines discussed in *FES*, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). "To establish a discriminatory refusal to hire, the General Counsel must . . . first show the following . . . (1) that the respondent was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants." If the General Counsel is successful in meeting his burden, the Respondent must show that it would not have hired or considered the applicants even in the absence of their union activity or affiliation.

I conclude that the General Counsel has met his initial *Wright Line* burden under *FES*, and that the Respondent has failed to demonstrate that it would not have hired Padilla, Johnson, and Juarez even in the absence of their union affiliation. As to the *Wright Line* burden, I found that the Respondent had placed help wanted advertisements in January, that it repeatedly solicited its employees for help in finding bricklayers to hire, and that it hired the Sral brothers shortly after Padilla, Johnson, and Juarez unsuccessfully attempted to approach Omielan about a job. Thus, the evidence is persuasive, and I conclude, that the Respondent was hiring and had concrete plans to hire at the time the three applicants approached the Respondent. I also found that the Respondent hired two additional bricklayers in June.

I also conclude that Padilla, Johnson, and Juarez had experience relevant to the bricklayer position.[24] Padilla is a journeyman bricklayer with 7 years of experience, who completed a union apprenticeship program. Juarez is a journeyman bricklayer with about 9 years of experience, who has completed 4500 hours of apprentice training. Johnson has been a bricklayer for over 3 years, and is enrolled in a union apprenticeship program in which he has completed his classroom training and 2000 hours of on-the-job training.

The only detailed evidence in the record as to the Respondent's requirements for the bricklayer position is contained in Respondent's job description for the "bricklayer" position, which states: "1 year of experience learning the brick mason trade as a helper or apprentice. Or enter apprenticeship pro-

[22] Based on my finding of facts, I do not also conclude that Omielan, at the March 23 meeting, imposed a rule prohibiting any employee from speaking to a union agent as alleged in the complaint.

[23] Or that the Respondent had one job opening, not three. This argument implies that the Respondent could not hire all or any of the three union job applicants because it had, assertedly, one opening, not three.

[24] And certainly to the helper position that the Respondent hired Marcin Sral to. Padilla and Johnson credibly testified that they would accept any position offered by the Respondent.

gram with our company." Clearly, Padilla, Johnson, and Juarez all met that criteria. While it may be true, as argued by the Respondent, that Jaroslaw Sral possessed more experience than Johnson, Sral was not an applicant for the position at the time Padilla, Johnson, and Juarez attempted to secure positions with the Respondent, and there is no evidence that Omielan inquired into either Sral's qualifications at the time they were hired, other than union membership.

Finally, as to the General Counsel's *Wright Line* burden, I conclude that the Respondent repeatedly displayed animus during the entire period discussed above. In addition to the other unfair labor practices found herein, in the course of interrogating Jaroslaw Sral, Omielan used a strong expletive in describing his view of the Union and told Sral that it was good that Sral did not belong to the Union. The striking difference in the Respondent's treatment of the union applicants seeking work, as opposed to the Sral brothers' treatment, is further evidence of antiunion animus. See *R. J. Corman Railroad Construction*, 349 NLRB 987, 989 (2007). Based on the findings, I conclude that the General Counsel has demonstrated that antiunion animus was a motivating factor in the Respondent's decision not to hire or consider for hire Padilla, Johnson, and Juarez.

I further conclude that the Respondent has failed to demonstrate that it would not have hired the applicants even in the absence of union activity or affiliation. Omielan testified that he didn't hire the three union applicants because he wanted one bricklayer, not three. In its brief, the Respondent argues that Jaroslaw Sral, who was later hired, had superior qualifications than one of the three union applicants, Johnson. Neither argument is persuasive. Nothing in the record supports the idea that the union applicants presented themselves as an all or nothing proposition. Further, Marcin Sral, whom the Respondent also hired, had far fewer qualifications than union applicant Johnson, and at the time that the three union applicants attempted to apply for jobs, or that Jaroslaw and Marcin Sral was hired. Within a week of hire, Marcin Sral was performing bricklayer work. Omielan neither asked nor knew anything about any of their qualifications. Inasmuch as the General Counsel has met its burden under *FES*, supra, and the Respondent has failed to meet its resultant burden, I conclude that the Respondent refused to hire Padilla, Johnson, and Juarez in violation of Section 8(a)(3) of the Act.

The Board, in *FES,* supra at 15, sets forth the following elements as the basis to decide refusal-to-consider allegations: "to establish a discriminatory refusal to consider pursuant to *Wright Line,* supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation."

Here, I conclude that the General Counsel has met its initial burden, and that the Respondent has failed to meet its resultant burden. Thus, Omielan brusquely dismissed the attempts of Probola, Johnson, and Juarez to inquire about employment, and denied their request for applications. Yet, during the same approximate time period, Omielan was soliciting applicant referrals from other employees, and shortly afterwards hired two new employees. The General Counsel also established Omielan's antiunion animus, as discussed above. Further, as discussed above, the Respondent has failed to demonstrate that it would not have considered the applicants even in the absence of their union activity or affiliation. Accordingly, I conclude that the Respondent violated Section 8(a)(3) of the Act by refusing to consider for hire Padilla, Johnson, and Juarez, as alleged in the complaint.

D. Alleged Discharges of Probola and Kwiecien

The complaint alleges that on March 22, the Respondent discharged and/or constructively discharged Jack Probola and Andrzej Kwiecien. The complaint further alleges that on the same date the Respondent violated Section 8(a)(1) when Omielan told employees (Probola and Kwiecien) that they were not allowed on the jobsite or to work on the jobsite because of their union membership and sympathies. The Respondent maintains in its brief that Omielan's and Podjasek's testimony should be credited over Kwiecien's and Probola's, to the effect that Probola and Kwiecien chose to walk off the job after being told they would not be given a pay raise.

As to the alleged discharges, I found as follows, based on my assessment of witness credibility: that bricklayers Probola and Kwiecien, both organizers for the Union, were hired by the Respondent; that Probola started work on February 27 and Kwiecien on March 5; that the Respondent was unaware of their union relationship at the time of hire; that on March 22, on the jobsite, Kwiecien handed Omielan a letter which stated that he and Probola were requesting a pay raise to area standards and that on their own time they intended to organize the remainder of the Respondent's employees; that upon reading the letter, Omielan told Probola and Kwiecien that they wanted more money than "the Union made," and that he couldn't give them that kind of money; that Kwiecien asked Omielan if they could still work and organize the Respondent on their own time; that Omielan replied that he had a feeling that they were from the Union, they were not supposed to be working on the job, they didn't belong there, and should just leave; and that Probola and Kwiecien left the job, and have not worked for the Respondent since.

The "test for determining whether an employer's statements constitute an unlawful discharge depends on whether they would reasonably lead the employees to believe that they had been discharged" and "the fact of discharge does not depend on the use of formal words of firing. . . . It is sufficient if the words or actions of the employer would lead a prudent person to believe his tenure had been terminated." *Ridgeway Trucking Co*., 243 NLRB 1048, 1049 (1979), enfd. 622 F.2d 1222 (5th Cir. 1980) (footnoted citations omitted). Here, crediting Kwiecien and Probola, Omielan's response to Kwiecien's question about staying and working, in which he links their union membership to his instruction to leave the job, leads to the conclusion that he fired both Probola and Kwiecien even though he did not use the words "discharged" or "fired." While the Respondent correctly asserts in its brief that if Podjasek and,

hence, Omielan were to be credited, then Kwiecien and Probola walked off the job of their own volition, I, instead, credited Probola and Kwiecien.

Applying the *Wright Line* test to the discharges, I, further, conclude that Probola and Kwiecien were discharged because of their relationship with the Union. Thus, both Probola and Kwiecien were union organizers, at the time of discharge the Respondent was aware that they maintained a relationship with the Union, and Omielan possessed antiunion animus, as found above. The Respondent presented no evidence that it would have discharged Probola and Kwiecien even absent their union activity. Finally, Omielan, himself, connected their union activity to the discharges. Under these circumstances, I conclude that the Respondent discharged both Kwiecien and Probola in violation of Section 8(a)(3), as alleged in the complaint.

I further conclude that Omielan's statement to Probola and Kwiecien that they didn't belong on the job and should leave (because they belonged to the Union), is coercive and violates Section 8(a)(1) as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Jack Probola and Andrzej Kwiecien on March 22, 2007, and by refusing to hire or consider for hire Luciano Padilla, Dwan Johnson, and Humberto Juarez on March 9, 2007, the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

4. By the following actions, on the dates set forth below, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

(a) On March 22, 2007, telling employees that they didn't belong on the job and should leave because of their union affiliation.

(b) On March 16, 17, and 28, coercively interrogating employees about their union membership.

(c) On March 23, telling employees that other employees were discharged because of their union affiliation, thereby implying that employees would be discharged if they supported or joined the union.

(d) On March 23, telling employees to eat their lunches on the jobsite and not go to their cars during lunch so as to avoid contact with union representatives.

(e) On March 23, instructing employees to call the police if they saw individuals associated with the union.

5. The unfair labor practices set out in paragraphs 3 and 4, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent in no manner, other than that specifically found herein, including any other manner alleged in the complaint, has violated the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, as is set forth above, it will be ordered to cease and desist therefrom and from any like or related conduct. Having found that the Respondent discriminatorily discharged Jack Probola and Andrzej Kwiecien, and discriminatorily refused to hire and consider for hire Luciano Padilla, Dwan Johnson, and Humberto Juarez, the Respondent must make them whole for its unlawful conduct against them. As they are all union salts, the duration of the backpay period shall be determined in accordance with the evidentiary requirement set forth in *Oil Capitol Sheet Metal*, 349 NLRB No. 118 (2007). Backpay shall be computed in accordance *with F. W. Woolworth Co*., 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent will also be ordered to offer reinstatement to Probola and Kwiecien, and instatement to Padilla, Johnson, and Juarez. Further, the Respondent will be ordered to remove from its files any references to the unlawful discharges and refusals to hire or consider for hire, and notify the employees that it has done so and will not use their discharges or refusals to hire or consider for hire against them in any way.

It will also be ordered that the Respondent post a remedial notice.

On these findings and conclusions of law, and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Jerry Ryce Builders, Inc., Illinois, Chicago, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they didn't belong on the job and should leave because of their union affiliation.

(b) Telling employees that other employees who belonged to a union had been discharged, thereby implying that any employees who joined a union or engaged in union activities would also be discharged.

(c) Telling employees to stay on the jobsite during their lunch breaks so as to avoid contact with union representatives.

(d) Telling employees to call the police if they observe individuals affiliated with a union on the jobsite.

(e) Coercively interrogating employees concerning their union membership, activities, or sympathies.

(f) Discharging employees because of their union membership, activities, or sympathies and/or to discourage employees in these activities.

(g) Refusing to hire, or consider for hire, individuals because of their union membership, activities, or sympathies and/or to discourage employees in these activities.

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer full reinstatement to Jack Probola and Andrzej Kwiecien to their former jobs or, if those jobs no longer exist, offer them substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed.

(b) Within 14 days from the date of this Order, offer to Luciano Padilla, Dwan Johnson, and Humberto Juarez employment in the jobs for which they applied or, if such jobs no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled if they had not been discriminated against.

(c) Make whole Jack Probola, Andrzej Kwiecien, Luciano Padilla, Dwan Johnson, and Humberto Juarez for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the discharges of Jack Probola and Andrzej Kwiecien, and the refusal to hire and consider for hire Luciano Padilla, Dwan Johnson, and Humberto Juarez, and within 3 days thereafter notify them in writing that this has been done, and that the discharges and refusals to hire or consider for hire will not be used against them in any way.

(e) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Regional Director, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records, including electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Chicago, Illinois office and jobsites copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by other materials. In the event that during the pendency of the proceedings the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, copies of the notice to all employees and former employees of the Respondent at any time since March 1, 2007.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 19, 2007

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell employees that they don't belong on the job and should leave because of their union affiliation.

WE WILL NOT coercively interrogate employees about their union membership, activities, or sympathies.

WE WILL NOT tell employees that other employees who belonged to a union had been discharged, or otherwise imply that employees who join a union or engage in union activities would be discharged.

WE WILL NOT tell employees to stay on the jobsite during their lunchbreaks so as to avoid contact with union representatives.

WE WILL NOT tell employees to call the police if they observe individuals affiliated with a union on the jobsite.

WE WILL NOT discharge employees because of their union membership, activities, or sympathies and/or to discourage employees in these activities.

WE WILL NOT refuse to hire employee-applicants because of their union membership, activities, or sympathies and/or to discourage employees in these activities.

WE WILL NOT refuse to consider for hire employee-applicants because of their union membership, activities, or sympathies and/or to discourage employees in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to Luciano Padilla, Dwan Johnson, and Humberto Juarez employment in the jobs for which they applied or, if such jobs no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if we had not discriminated against them.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to Jack Probola and Andrzej Kwiecien

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Luciano Padilla, Dwan Johnson, Humberto Juarez, Jack Probola, and Andrzej Kwiecien whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to consider Luciano Padilla, Dwan Johnson, and Humberto Juarez for hire or to hire them, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusals to consider them for hire or to hire them will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful discharges of Jack Probola and Andrzej Kwiecien, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

JERRY RYCE BUILDERS, INC.